In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. ——

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

v.

RAYMOND BELCHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion and order of the United States District Court for the Southern District of West Virginia (App. A, *infra,* pp. 11–21) are not yet reported.

JURISDICTION

The judgment of the district court declaring 42 U.S.C. 424a unconstitutional as applied to appellee Belcher was entered on September 14, 1970 (App. A, p. 21). A notice of appeal was filed on October 13, 1970 (App. A, pp. 21–23). The jurisdiction of this Court is conferred by 28 U.S.C. 1252: *Fleming* v. *Rhodes,* 331 U.S. 100; *Flemming v. Nestor,* 363 U.S. 603.

411-537—70——1

QUESTION PRESENTED

Whether the provision in the Social Security Act requiring the reduction of social security disability benefits because of the simultaneous receipt of state workmen's compensation benefits is constitutional.

STATUTES AND REGULATIONS INVOLVED

Section 424a of Title 42, United States Code (Supp. V), together with the relevant Department of Health, Education and Welfare regulations, are set forth in Appendix B, *infra*, pp. 24–41.

STATEMENT

Appellee Raymond Belcher is a resident of West Virginia who has had his social security disability benefits reduced under Section 224 of the Social Security Act, 42 U.S.C. (Supp. V) 424a, because of his simultaneous receipt of periodic workmen's compensation benefits. He instituted this action for review of the administrative decision, seeking a declaration that the section is unconstitutional and inapplicable to him. This is a direct appeal from the order of a single-judge district court holding Section 224 unconstitutional and inapplicable to the appellee.

Section 224(a) provides that for any month in which an individual under age 62 is entitled to both social security benefits and periodic workmen's compensation benefits under any federal or state law, such individual's social security benefits shall be reduced by the amount by which the total benefits received under the social security and workmen's compensation programs for that month exceeds the higher of:

(a) 80 percent of the individual's "average current earnings" [1] or (b) the total of certain other designated disability benefits. Section 224(b) provides that, should such an individual receive a lump sum settlement as a substitute for or a commutation of periodic workmen's compensation benefits, the reduction "shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a)."

The facts of this case are not in dispute. Belcher was awarded disability insurance benefits. Because he was also receiving workmen's compensation benefits under West Virginia law, his disability benefits were reduced as required by Section 224.[2] After exhausting his administrative remedies, Belcher instituted the

[1] An individual's "average current earnings" is defined as the larger of the average monthly wage used for purposes of computing his benefits under 42 U.S.C. 423, or one-sixtieth of his total wages and self-employment income for the five consecutive years after 1950 when they were highest. The 1968 amendments (Pub. L. 90-248, Title I, Sec. 159(a), 81 Stat. 869) changed this clause to provide that when an individual's wages and self-employment income for the five consecutive years during which they were highest are used to compute his "average current earnings," then his actual earnings, rather than those earnings creditable for purposes of social security (which have an upper limit), are to be used.

[2] Beginning in October, 1968, Belcher was awarded monthly social security disability insurance benefits of $156.00 for himself and $57.90 each for his wife and two children, for a total of $329.70 per month. But in January, 1969, Belcher was notified that $104.40 was being withheld from such monthly social security benefits because he was receiving $47.00 a week, or $203.60 a month in workmen's compensation, thereby reducing his monthly federal payments to $225.30 (Admin. Tr. 9, 12, 25-27, 29).

present action, alleging that Section 224 is unconstitutional because: (1) it discriminates irrationally between recipients of workmen's compensation benefits whose social security benefits are reduced, and all other recipients of benefits or awards, such as private insurance beneficiaries and successful tort plaintiffs, whose benefits are not reduced and (2) it deprives him and his family of property, in the form of social security benefits for which he has at least partially paid through social security taxes, without due process of law.[3] The district court held that Section 224 unconstitutionally discriminates against Belcher by requiring the reduction of his social security benefits and that it deprives him of property without due process of law (App. A. pp. 11–19).

THE QUESTION IS SUBSTANTIAL

1. In this case the district court invalidated a significant provision of a major Act of Congress designed to effectuate proper legislative ends.[4] Every

[3] Belcher also alleged that Section 224 was unconstitutional because it arbitrarily required the reduction of his social security benefits without taking account of attorney's fees paid by him in connection with his workmen's compensation claim. The district court did not rule on this allegation. At the administrative hearing, however, Belcher testified that he was not at that time paying any attorney's fee out of the workmen's compensation benefits he had been receiving (Admin. Tr. 30–31). Moreover, the Secretary will take into account the payment of such expenses, if they are identifiable, in computing the reduction. See 20 C.F.R. 404.408(d), App. B, *infra*, p. 34.

[4] See the Government's Motion to Affirm in *Bartley* v. *Richardson*, No. 703, October Term, 1970, pp. 6–12, presently pending before this Court on appeal from a district court decision upholding the constitutionality of the same provision.

other court which has considered this question has upheld the provision.[5]

The need for this Court to determine the constitutionality of Section 224 is underscored by several factors. The large number of decided and pending cases in which the statute's constitutionality has been challenged (see note 5, *supra*) demonstrates the widespread significance of the question.[6] Now that a court has invalidated the provision, further challenges are likely to be made; all fifty states, the District of Columbia, Puerto Rico and the United States have workmen's compensation laws. Since in many jurisdictions such laws have characteristics

[5] In addition to *Bartley*, *supra* note 4, the constitutionality of Section 224 has been upheld in the following cases: *Nieves* v. *Secretary of HEW*, 1 CCH Unemployment Ins. Rptr., Fed. Matter No. 15,479 (Puerto Rico, 1969); *Gambill* v. *Finch*, 309 F. Supp. 1 (E.D. Tenn.); *Barber Lofty* v. *Cohen* (E.D. Mich., Civil No. 30916, decided March 25, 1970, pending before the Sixth Circuit, No. 20,484); *Bailey* v. *Finch*, 312 F. Supp. 918 (N.D. Miss); *Johnney Benjamin* v. *Finch* (E.D. Mich., Civ. No. 32816, decided May 26, 1970, pending before the Sixth Circuit, No. 20,714); *Louis E. Miley* v. *Finch* (E.D. Mich., Civ. No. 33560, decided June 12, 1970); *Edward O. Gooch* v. *Finch* (S.D. Ohio, Civ. No. 6840, decided July 13, 1970).

The following cases involving challenges to the constitutionality of Section 224 are pending: *Sheets* v. *Finch* (S.D. W.Va., Civil No. BK 69-3); *Rodatz* v. *Finch* (E.D. Ill., Civil No. 69-170); *Copeland* v. *Finch* (W.D. Okla., Civil No. 69-363); *Wren* v. *Finch* (W.D. Mich., Civil No. 6171); *McAlonan* v. *Finch* (W.D. Mich., Civil No. 6269).

[6] The fiscal strain on the social security fund that would be imposed by the invalidation of Section 224 is significant. The Social Security Administration estimates that as a result of the statute's offset provision, the reduction in benefits throughout the country in 1970 will be $28,610,638.

similar to those of West Virginia relied upon by the court below—namely, that in that state workmen's compensation is a private rather than a public right, since it depends upon a contract [7]—the decision below, if followed in those areas, would result in the invalidation of Section 224 in a substantial portion of the country.

The court's alternative ground for invalidating the statute—that it deprives appellee of property rights without due process of law—poses an even greater threat to Section 224, and, indeed, to other important provisions of the Social Security Act. For, should a claimant's statutory right to disability benefits be deemed to be an indefeasible property right not subject to any statutory limitations, doubt would be cast upon other important provisions of the Act, such as those requiring the reduction of an individual's benefits because of his excess earnings (42 U.S.C. 403(b)) and the limitation of benefits to children adopted by an individual after he becomes entitled to benefits (42 U.S.C. 402(d)).

2. Section 224 satisfies the requirements of due process and equal protection; neither of the grounds

[7] Under the workmen's compensation laws of all jurisdictions the employer must pay for at least a portion, if not all, of the benefits, either through contributions to the state-regulated fund, as in West Virginia, or through payment of premiums to its insurance carrier. Out of fifty-three total jurisdictions, including the states, the District of Columbia, Puerto Rico and the United States, twenty-nine require private employers to participate in the workmen's compensation system and twenty-four allow private employers to elect not to participate, on penalty of loss of their common law defenses. 3 Larson, *Workmen's Compensation*, Table 7 at pp. 522–523 (1968) and Supp. 1970, p. 117.

relied upon by the court below in striking it down is well founded.

We have fully discussed the contention that Section 224 discriminates unconstitutionally against recipients of workmen's compensation benefits in our motion to affirm in *Bartley* v. *Richardson, supra,* note 4, to which we refer the Court. We add here only that the reliance of the court below on the characterization of West Virginia's workmen's compensation benefits as private in nature is misguided.[8] Our argument in support of Section 224 in no way depends upon whether state workmen's compensation benefits are derived from public or private sources. Instead our argument is that in effectuating the purposes of the social security disability system—namely, rehabilitating the disabled worker and encouraging him to return to productive work as soon as he is able, and preventing the erosion or repeal of state workmen's compensation systems[9]—Congress rationally chose to reduce the so-

[8] Even on its own terms, the court's conclusion that workmen's compensation benefits are "private" is questionable. As in all other jurisdictions, both state and federal, the workmen's compensation system in West Virginia exists solely by virtue of state legislation (W. Va. Code, Chap. 23 (1966 ed.). Moreover, the West Virginia system is administered by a state commissioner. (W. Va. Code, § 23–1–1) and operates solely because of the sanctions imposed by state law. Thus, while private employers may elect not to participate in the system, employers so deciding must provide their own method of compensation, which must be approved by the commissioner, and post sufficient bond to insure payment of compensation and expenses to their injured employees (W. Va. Code, § 23–2–9).

[9] See our motion to affirm in *Bartley*, pp. 6–12.

cial security payments to recipients of duplicating benefits.[10]

3. The district court also held Section 224(a) unconstitutional on the ground that the statute deprives Belcher of a property right—his disability benefits—without due process of law. In support of this holding, the court cited *Goldberg* v. *Kelly*, 397 U.S. 254, which held that the welfare benefits of an individual recipient cannot be terminated without an evidentiary hearing. According to the court below, the reasoning of *Goldberg* applies equally to social security disability benefits, and, consequently, Section 224 cannot constitutionally reduce Belcher's right to receive social security disability benefits. However, even if *Goldberg* were extended to apply to the disability benefits in question here,[11] that case dealt only with the procedural rights of a person whose benefits are terminated

[10] As we explain in our motion to affirm in *Bartley*, p. 12, the fact that Congress might have gone further than it did, so as to apply the offset provisions to recipients of benefits from sources such as private insurance or tort claim recovery, does not invalidate the distinction questioned here. Legislative reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

[11] In *Flemming* v. *Nestor*, 363 U.S. 603, this Court sustained the statutory termination of the social security old-age benefits of an alien deported because of his membership in the Communist party, adding that an individual who has become eligible to receive benefits under the Social Security Act does not have an indefeasible property right to those benefits. According to the district court, *Goldberg* implicity overruled *Nestor*, and the court considered this to be dispositive of the instant case. As stated in the text, however, *Goldberg* did not deal with the validity of rational statutory distinctions, and the opinion did not even refer to *Nestor*.

because of alleged failure to meet statutory qualifications. *Goldberg* has no bearing upon the substantive validity of rational statutory limitations such as the qualification in Section 224 held invalid by the court below.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
CARL EARDLEY,
Acting Assistant Attorney General.
RICHARD B. STONE,
Assistant to the Solicitor General.
ROBERT V. ZENER,
JAMES C. HAIR, JR.,
Attorneys.

DECEMBER 1970.

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APPENDIX A

In the United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER, PLAINTIFF

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

CHRISTIE, *District Judge:*

This is an action under Section 205(g) of the Social Security Act, 42 U.S.C.A. 405(g), to review a final decision of the Secretary of Health, Education and Welfare. A decision by a hearing examiner on October 31, 1969, became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. The matter is before the Court on the cross motions of the parties for summary judgment pursuant to Rule 56.

The plaintiff filed an application for disability insurance benefits on May 20, 1968, alleging that he became unable to work on March 25, 1968, as the result of an injury. On May 20, 1968, his wife and children also applied for benefits under the Act. The Secretary having determined that plaintiff was disabled within the meaning of the Act, all applicants were awarded benefits on September 30, 1968, such benefits to begin with the month of October 1968.

Later, plaintiff received an award of $203.60 per month from the Workmen's Compensation Fund of West Virginia as the result of a work-related injury.

Upon learning of this award, the Social Security Administration applied the "offset" provisions of Section 224 of the Social Security Act, 42 U.S.C.A. 424(a).[1]

On February 10, 1969, plaintiff's attorney requested a reconsideration of the offset reductions which the

[1] Section 224 of the Social Security Act, 42 U.S.C.A. Section 424, as amended, July 30, 1965 and January 2, 1968, provides:

"(a) If for any month prior to the month in which an individual attains the age of 62—

"(1) such individual is entitled to benefits under section 223, and

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month, the total of his benefits under section 223 for such month and of any benefits under section 202 for such month based on his wages and self-employment income will be reduced (but not below zero) by the amount by which the sum of—

"(3) such total of benefits under sections 223 and 202 for such month, and

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

exceeds the higher of—

"(5) 80 per centum of his 'average earnings', or

"(6) the total of such individual's disability insurance benefits under section 223 for such month and of any monthly insurance benefits under section 202 for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 223 and 202 for a month (in a continuous period of months) reduce such total below the sum of—

"(7) the total of the benefits under section 223 and 202, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have

Administration rejected on July 19, 1969. Thereupon, said attorney requested a hearing, held October 9, 1969, at which he presented argument supporting his claim that Section 224 deprived plaintiff and his family of a property right without due process of law and that it was discriminatory inasmuch as it discriminated unfairly between persons of a similar class. On October 31, 1969, the hearing examiner issued his opinion upholding the legality of the reduction of benefits. This decision became the final decision of the Secretary on January 20, 1970, when it was affirmed by the Appeals Council. Thereupon, plaintiff timely filed the instant action in this court.

I

As previously noted (footnote 1), Section 224 provides for a reduction in social security disability benefits for such time as the claimant receives workmen's compensation benefits for either total or partial disability. Workmen's compensation laws generally provide compensation to employees for loss resulting from industrial accidents and disease growing out of or resulting from their employment. The need for such a system arose out of conditions produced by modern industrial development and was premised upon the idea that the common-law rule of liability for personal injuries incident to the operation of industrial enterprises, which was based upon the negligence of the employer, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, was outmoded by modern conditions.

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been so determined if all of them had been so entitled in such first month), and

"(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made."

West Virginia's Workmen's Compensation Law is found in Chapter 23 of the West Virginia Code. The law creates a "Workmen's Compensation Fund" which is sustained by contributions made to it by the employers who voluntarily elect to come under the provisions of the law, such contributions being based upon a percentage of the gross wages of their employees. The employees make no direct monetary contributions to the fund and the system is state-operated. Basically, the law takes from the employee his common-law right to sue his employer for damages for negligence in return for payment from the fund of limited or scheduled benefits for disability or death resulting from or growing out of the employment relationship, regardless of any fault of the employer.

In West Virginia the relation of employer and employee, under the law, is termed contractual in nature, the statute becoming an integral part of the contract of employment, and imposing upon the employer and employee, respectively, a limitation of rights and liabilities. *Gooding* v. *Ott,* 77 W. Va. 487, 87 S.E. 862; *Lancaster* v. *State Compensation Comr.,* 125 W. Va. 190, 23 S.E. 2d 601. Thus, in no sense of the word can one's workmen's compensation benefits be termed a gratuity; rather they must be treated as a contractual entitlement. So it is seen that the issue before this Court as to this aspect of the case is whether or not Section 224 of the Social Security Act, requiring reduction in plaintiff's social security benefits in proportion to the amount of his workmen's compensation benefits, may be constitutionally applied.

II

It cannot be seriously contended that the Social Security Act itself is unconstitutional for its constitutionality has been upheld in a long line of cases.

Helvering v. *Davis,* 301 U.S. 619 (1937). See also *Steward Machine Company* v. *Davis,* 301 U.S. 584 (1937), and *Carmichael* v. *Southern Coal and Coke Company,* 301 U.S. 495 (1937). It is equally well settled that entitlement to social security benefits is subject to all conditions set out in the Social Security Act under which benefits are to be paid. *Flemming* v. *Nestor,* 363 U.S. 603 (1960); *Gruenwald* v. *Gardner,* 396 F. 2d 591 (2d Cir. 1968), cert. den. *Gruenwald* v. *Cohen,* 393 U.S. 982 (1968); *Price* v. *Flemming,* 168 F. Supp. 392 (D. Ct. N.J. 1968), affirmed 280 F. 2d 956 (3d Cir. 1960), cert. den. 365 U.S. 817 (1961).

Notwithstanding, as previously noted, plaintiff urges that the offset provision of Section 224 deprives him of his property (benefits) without due process of law. The answer would seem to hinge upon whether the plaintiff has such an indefeasible right or interest in his social security benefits that the concept of due process precludes application of the offset statute.

In *Flemming* v. *Nestor,* supra, the Court found that the old-age benefits of an alien, deported for cause under the Immigration and Nationality Act, could be lawfully terminated without offending the Due Process Clause of the Fifth Amendment. There the Court rationalized that the noncontractural interest of an employee covered by the Social Security Act cannot be analogized to that of the holder of an annuity, where the right to benefits is based on a contractual duty to pay premiums, and further, that to hold otherwise would render the law too inflexible to permit necessary adjustment to ever-changing conditions. Justices Black, Douglas and Brennan dissented, each filing a separate dissenting opinion and each strongly arguing that the alien had a property

right in his old-age benefits and to deprive him of them was a violation of due process.

We have been referred to several unreported decisions of district courts and one reported decision, *Bartley* v. *Finch,* 311 F.Supp. 876 (E.D. Ky. 1970), in support of the defendant's position that Section 224 may be constitutionally applied, and it would indeed be easy for us to follow that path. However, we are not convinced that the issue raised in this case deserves such cavalier treatment, especially in view of the more recent decision of the Supreme Court in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), which tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process. Such benefits, the Court states (p. 262), are a matter of "statutory entitlement for persons qualified to receive them," and as support for this conclusion the Court, in footnote 8 of the same page, refers to an article in the Yale Law Review stating that,

> "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' "

Therefore, since the Court in *Goldberg* appears to have determined that entitlement to welfare is in the nature of a property right, protected by the Due Process Clause of the Fifth Amendment, by the same rationale it must be determined that one who has made direct contribution to the social security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection. For it seems to us to be patently unfair for the welfare recipient, under *Goldberg,* to have a "property right status" with all the procedural safeguards of due process, while the social security recipient, under *Nestor,* is deprived of such

status and protection. The distinction is not only completely illogical, but is grossly inequitable. Indeed, it appears to run counter to the intent of Congress as reflected by the comments by Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character, as quoted in the *Nestor* dissent, p. 623:

> " 'It comports better than any substitute we have discovered with the American concept that free men want to *earn* their security and not ask for doles—that what is due as a matter of *earned right* is far better than a gratuity. . . . (Emphasis added)
>
> " '*Social Security is not a handout; it is not charity; it is not relief.* It is an *earned right* based upon the contributions and earnings of the individual. As an *earned right*, the individual is eligible to receive his benefit in dignity and self-respect.' " (Emphasis added) 102 Cong. Rec. 15110.

Thus, we must conclude that the concept espoused by the majority in *Nestor*, that one who has contributed to the social security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right to such benefits, is no longer to be considered a viable and controlling precedent for that principle, in view of the more recent holding in *Goldberg* that a welfare recipient who has made no direct contribution to the fund from which he draws benefits does have a recognizable property right to such benefits and one which is protected by all the safeguards of due process.

III

The other issue raised by the plaintiff is that the offset provision of Section 224 creates arbitrary dis-

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crimination between two classes of disabled workers, essentially indistinguishable from each other except that one is composed of those disabled persons who also receive workmen's compensation benefits and the other is composed of those disabled persons who also receive benefits from private disability insurance plans or tort claim awards, and that on the basis of this difference alone the first class has benefits reduced while the second class has benefits left untouched. In other words, the plaintiff complains that it is patently arbitrary to single out for the purpose of applying the offset *only* those who are receiving workmen's compensation and exclude those who are receiving benefits from other sources. The plaintiff further argues that the offset provision also discriminates between those who were disabled prior to June 1, 1965 and those who become disabled after June 1, 1965.

The defendant, in justification of these discriminatory features of the offset provision, argues that its purpose was to avoid duplication of *public* benefits. If this be its true purpose, it is certainly a laudable one and one with which this Court could wholeheartedly accept. However, the argument is inapplicable here for, as previously shown, workmen's compensation in West Virginia is not a gift from the public largesse, but rather is an entitlement arising from a contractual relationship between employer and employee, sanctioned by law, whereby each gave up a legal right in return for a concomitant legal benefit. That no public funds are involved is made abundantly clear by the provisions of West Virginia Code, 23–3–1. There, it is provided that the Workmen's Compensation Fund shall be supported by "premiums and other funds paid thereto by employers," from which shall be paid all benefits due the employees or their dependents and the expenses of administering the law. No public funds

being thus involved, the defendant's argument that plaintiff's workmen's compensation award should be treated as a public benefit obviously becomes quite untenable and must be rejected.

In sum, therefore, it is held that in the circumstances of plaintiff's case, the application of Section 224 cannot be constitutionally applied, since to do so would deprive him of due process and equal protection of the law under the Fifth and Fourteenth Amendments. The motion of the plaintiff for summary judgment will accordingly be granted and the motion of the defendant for summary judgment will be denied.

An appropriate order may be presented making this opinion a part of the record.

SIDNEY L. CHRISTIE,
United States District Judge.

United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER, PLAINTIFF

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

JUDGMENT ORDER

This cause having been submitted on brief, the transcript of record certified to this Court in the manner prescribed by law, and upon plaintiff's and defendant's motion for summary judgment; and the Court having made its findings of fact and conclusions of law, as appears from its memorandum opinion dated September 10, 1970, in which this Court expressed

the opinion that defendant's motion for summary judgment should be denied, and that an order should be entered denying the defendant the right to offset workmen's compensation payments from the Social Security benefits made to plaintiff, it is, therefore

ADJUDGED and ORDERED that the memorandum opinion of the Court, dated September 10, 1970, be, and the same is hereby filed and made a part of the record in this action, and that the decision of the Secretary of Health, Education, and Welfare, applying the offset provisions of Section 224 of the Social Security Act be, and the same is hereby reversed, and the proposed offset by the Secretary against the plaintiff be, and it is hereby denied.

And be it further ADJUDGED and ORDERED:

(1) That counsel for the defendant shall promptly file with the Court a report stating the amount of the initial past due benefits to be paid the plaintiff and/or any ancillary beneficiaries, pursuant to this judgment order. A copy of such report shall be furnished by the defendant to counsel for the plaintiff; and

(2) That counsel for the plaintiff shall, within fifteen (15) days of the entry of this judgment order, file with the Court a verified petition for the approval and allowance of a fee for representing the plaintiff in this Court, pursuant to the provisions of Section 206(b)(1) of the Social Security Act, as amended July 30, 1965, 42 U.S.C.A. 406(b)(1), exhibiting therewith the original or a duplicate-original of any written contract of employment between the attorney and the plaintiff, and in any event, showing (a) what services were rendered by the attorney in the case and specifically the amount of time he devoted to it in this Court; (b) what expenses, if any, were personally incurred by the attorney in the prosecu-

tion of the case in this Court and for which he has not been reimbursed by his client; and (c) what sums, if any, have been paid the attorney by the plaintiff or by anyone for the plaintiff for services rendered in this Court. The petition must also contain an affirmation by the attorney that he will neither demand, receive nor accept from the plaintiff or from anyone for the plaintiff, any fee or remuneration for services rendered in this case in this Court other than that approved and allowed by this Court pursuant to such petition.

And this case shall remain upon the docket until such statement of initial benefits shall have been received from the defendant and until the matters arising upon the petition for the approval and allowance of an attorney's fee to counsel for the plaintiff shall have been adjudicated.

Enter: September 14, 1970.

(s) SIDNEY L. CHRISTIE,
United States District Judge.

United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

Notice of Appeal to the Supreme Court of the United States Pursuant to 28 U.S.C. 1252 and 2101

Notice is hereby given that Elliott L. Richardson, Secretary of Health, Education and Welfare, defend-

ant herein, acting by and through the United States Attorney for the Southern District of West Virginia, hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. 1252 and 2101, from the Judgment entered in this action on September 14, 1970.

W. WARREN UPTON,
United States Attorney, Southern District of West Virginia, 4006 Federal Building, 500 Quarrier Street, Charleston, W. Va. 25301.

United States District Court for the Southern District of West Virginia at Bluefield

Civil Action No. 1185

RAYMOND BELCHER

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

AFFIDAVIT OF SERVICE

STATE OF WEST VIRGINIA,
County of Kanawha:

W. Warren Upton, being first duly sworn on his oath deposes and says that he is a resident of the City of Charleston, County of Kanawha, State of West Virginia.

That he is the United States Attorney for the Southern District of West Virginia, at Bluefield, West Virginia, and

That on the 13th day of October, 1970 he mailed, postage prepaid, a copy of Notice of Appeal To The Supreme Court Of The United States, filed in the

above-captioned case, to counsel for plaintiff-appellee, as follows:

Mr. Marshall G. West
Attorney At Law
P. O. Drawer 469
Pineville, West Virginia 24874

W. WARREN UPTON,
United States Attorney, Southern District of West Virginia, 4006 Federal Building, 500 Quarrier Street, Charleston, W. Va. 25301.

SUBSCRIBED and SWORN to before me, this 13th day of October, 1970.

(S) BETTY JEAN MILLER,
Notary Public in and for Kanawha County, West Virginia.

My commission expires September 10, 1973.

APPENDIX B

42 U.S.C. 424a provides:

§ 424a. REDUCTION OF DISABILITY BENEFITS THROUGH RECEIPT OF WORKMEN'S COMPENSATION.

(a) If for any month prior to the month in which an individual attains the age of 62—

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of—

(3) such total of benefits under sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid (for such month to such individual under the workmen's compensation law or plan, exceeds the higher of—

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and

self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 423 and 402 of this title for a month (in a continuous period of months) reduce such total below the sum of—

(7) the total of the benefits under sections 423 and 402 of this title, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a) and 411(b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest. In any case where an individual's wages and self-employment income reported to the Secretary for a calendar year reach the limitations specified in sections 409(a) and 411(b)(1) of this title, the Secretary under regulations shall estimate the total of such wages and self-employment income for puropses of clause (B) of the preceding sentence on the basis of such information as may

be available to him indicating the extent (if any) by which such wages and self-employment income exceed such limitations.

(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section.

(c) Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 403 of this title but before deductions under such section and under section 422(b) of this title.

(d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title.

(e) If it appears to the Secretary that an individual may be eligible for periodic benefits under a workmen's compensation law or plan which would give rise to reduction under this section, he may require, as a condition of certification for payment of any benefits under section 423 of this tile to any individual for any month and of any benefits under section 402 of this title for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Secretary may, in the absence of evidence to the contrary, rely upon such a certification by

such individual that he has not filed and does not intend to file such a claim or that he has so filed and no final decision thereon has been made, in certifying benefits for payment pursuant to section 405(i) of this title.

(f)(1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 423 of this title and any benefits under section 402 of this title based on his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Secretary shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decrease in the total amount of benefits payable under this subchapter on the basis of such individual's wages and self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1) of this subsection, the individual's average current earnings (as defined in subsection (a) of this section) shall be deemed to be the product of his average current earnings as initially determined under subsection (a) of this section and the ratio of (i) the average of the taxable wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to (ii) the average of the taxable wages of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which

is not a multiple of $1 shall be reduced to the next lower multiple of $1.

(g) Whenever a reduction in the total of benefits for any month based on an individual's wages and self-employment income is made under this section, each benefit, except the disability insurance benefit, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit shall then be applied to such disability insurance benefit.

Part 404.408 of 20 C.F.R. provides:

§ 404.408 Reduction of Benefits Based on Disability on Account of Receipt of Workmen's Compensation.

(a) *When reduction required.* Under section 224 of the Act, a disability insurance benefit to which an individual is entitled under section 223 of the Act for a month after 1965 and before the individual attains age 62 (and any monthly benefit for the same month payable to others under section 202 of the Act on the basis of the same earnings record) is reduced (except as provided in paragraph (b) of this section) by an amount as determined under paragraph (c) of this section if:

(1) The individual entitled to the disability insurance benefit is also entitled under a workmen's compensation law or plan of the United States or a State to a periodic benefit for such month for a total or partial disability (whether or not permanent) and

(2) The Secretary has, in a month before such month, received notice of such entitlement for such month, and

(3) The period of disability involved began after June 1, 1965.

(b) *When reduction not made.* The reduction of a benefit otherwise required by paragraph (a) of this section is not made if the workmen's compensation law or plan under which the periodic benefit is payable provides for

the reduction of such periodic benefit when anyone is entitled to a benefit under title II of the Act on the basis of the earnings record of an individual entitled to a disability insurance benefit under section 223 of the Act.

(c) *Amount of reduction*—(1) *General.* The total of benefits payable for a month under sections 223 and 202 of the Act to which paragraph (a) of this section applies is reduced (but not below zero) by the amount by which the sum of such total of benefits and such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan exceeds the higher of:

(i) Eighty percent of his "average current earnings," as defined in subparagraph (3) of this paragraph, or

(ii) The total of such individuals's disability insurance benefit for such month and all other benefits payable for such month based on such individual's earnings record, prior to reduction under this section.

(2) *Limitation on reduction.* In no case may the total of monthly benefits payable for a month to the disabled worker and to the persons entitled to benefits for such month on his earnings record be less than:

(i) The total of the benefits payable (after reduction under paragraph (a) of this section) to such beneficiaries for the first month for which reduction under this section is made, and

(ii) Any increase in such benefits which is made effective for months after the first month for which reduction under this section is made.

(3) *Average current earnings defined*—(i) *In general.* An indiivdual's "average current earnings" for purposes of this section means the larger of:

(*a*) The average monthly wage used for purposes of computing the individual's disability insurance benefit under section 223 of the Act, or

(*b*) One-sixtieth of the total of such individual's wages and earnings from self-employment without the limitations under sections 209(a) and 211(b)(1) of the Act for the 5 consecutive calendar years after 1950 for which such wages and earnings from self-employment were highest. The extent by which such individual's wages and earnings from self-employment exceed the limitations under sections 209(a) and 211(b)(1) of the Act for any calendar year after 1950 is computed in accordance with the provisions of subdivision (ii) of this subparagraph. Any amount so computed which is not a multiple of $1 is reduced to the next lower multiple of $1.

(ii) ***Method of determining calendar year earnings in excess of the limitations under sections 209(a) and 211(b)(1) of the Act***—(*a*) *In general.* For the purposes of subdivision (i)(*b*) of this subparagraph, the extent by which the wages or earnings from self-employment of an individual exceed the maximum amount of earnings creditable under sections 209(a) and 211(b)(1) of the Act in any calendar year after 1950 will ordinarily be estimated on the basis of the earnings information available in the records of the Administration. (See Subpart I of this part.) If an individual adduces satisfactory evidence of his actual earnings in any year, the extent, if any, by which his earnings exceed the limitations under sections 209(a) and 211(b)(1) of the Act shall be determined by the use of such evidence instead of by the use of estimates.

(b) *Estimated wage earnings*—(*1*) *One employer involved.* In any calendar year after 1950 in which wages are reported for an individual, the wages credited to his earnings record for each calendar quarter before the quarter in which the maximum amount creditable under section 209(a) of the Act is attained are deemed to be the individual's actual earnings for each such quarter. The amount of wages for the

calendar quarter in which the maximum amount of earnings was attained and for each succeeding calendar quarter of that year, if any, in which the individual worked is deemed to be equal to the largest amount credited to his earnings account in that calendar year for any calendar quarter through the quarter in which the maximum amount of earnings was attained.

Example. In the year 1966 in which $6,600 is the maximum creditable earnings amount under section 209(a) of the Act. W worked for the XYZ Company. His earnings record shows the following amounts of wages:

1st quarter	$2,400
2d quarter	2,550
3d quarter	1,650
4th quarter	0
Total	6,600

The maximum creditable earnings amount was reached in the third quarter. The amount of wages for that quarter and for the succeeding fourth quarter is deemed to equal the highest quarterly amount credited, i.e., the amount of $2,550 credited to the second quarter. Thus W's total estimated wages for the year 1966 are determined as follows:

1st quarter	$2,400
2d quarter	2,550
3d quarter	2,550
4th quarter	2,550
Total	10,050

(*2*) *Two or more employers involved.* In any calendar year after 1950 in which wages are reported for an individual by more than one employer, if the total wages reported by any employer equal or exceed the maximum amount of earnings creditable under section 209(a) of the Act, the total wages from such employer for the quarters in which the individual worked for that employer are estimated in accordance with the provisions of (*1*) of this subdivision (ii) (*b*).

Example. In the calendar year 1964 in which $4,800 is the maximum amount of earnings creditable under section 209(a) of the Act, A

worked for four employers. The following amounts are creditable to his earnings record:

	Employer No. 1	Employer No. 2	Employer No. 3	Employer No. 4	Total
1st quarter	$1,400	$1,200	$0	$0	
2d quarter	1,200	1,200	150	300	
3d quarter	2,200	1,200	0	1,800	
4th quarter	0	1,200	250	2,700	
	$4,800	$4,800	$400	$4,800	$14,800

Wages from Employer No. 1 reached the maximum in the third quarter. For this quarter and the succeeding fourth quarter, A's wages from Employer No. 1 are deemed to equal $2,200 in each of these two quarters. Wages from Employer No. 2 reached the maximum in the fourth quarter, but since all of the quarterly amounts credited are equal, there are no additional deemed wages. Since the total wages reported by Employer No. 3 never reached the maximum, the actual amounts credited are deemed to be his total wages from such employer. Wages from Employer No. 4 reached the maximum in the fourth quarter. However, since this is the highest quarterly amount credited and there are no succeeding quarters, the total earnings from this employer are deemed to be the actual amounts credited. Thus, A's total wages for 1964 are estimated as follows:

	Employer No. 1	Employer No. 2	Employer No. 3	Employer No. 4	Total
1st quarter	$1,400	$1,200	$0	$0	
2d quarter	1,200	1,200	150	300	
3d quarter	2,200	1,200	0	1,800	
4th quarter	2,200	1,200	250	2,700	
	$7,000	$4,800	$400	$4,800	$17,000

(c) *Estimated earnings from self-employment.* In any such calendar year in which self-employment income is credited to an individual's earnings record and such credit equals

the maximum amount of earnings creditable under section 211(b)(1) of the Act, the amount of earnings from self-employment for such individual's taxable year is deemed to equal his total net earnings from self-employment as shown in his tax returns on file in the records of the Administration.

Example. In the calendar year 1957 in which $4,200 is the maximum amount creditable as self-employment income under section 211(b)(1) of the Act, C has maximum self-employment income of $4,200 credited to his earnings record. C's self-employment tax return for 1957 shows net earnings from self-employment of $8,300. Thus, C's earnings from self-employment are deemed to equal $8,300 for 1957.

(*d*) *Wages and self-employment income involved.* In any such calendar year, in which both wages and self-employment income are credited to an individual's earnings record, the amount of such individual's total earnings for such calendar year is deemed to equal the total of his wages as determined under the provisions of (*b*) of this subdivision and the amount of his net earnings from self-employment as determined under the provisions of (*c*) of this subdivision.

Example. For the calendar year 1967 in which $6,600 is the maximum creditable earnings under sections 209(a) and 211(b)(1) of the Act, D who was both employed and self-employed has the following amounts credited to his earnings record:

	Wages	Self-employment income
1st quarter	$1,500	
2d quarter	1,500	
3d quarter	1,500	
4th quarter	1,500	
	$6,000	$600

Since the amount of wages credited do not equal or exceed the maximum amount creditable under section 209(a) of the Act, D's total wages for the year are deemed to be $6,000. However, the amount of net earnings from self-employment shown on D's self-employment tax return is $2,300. D's earnings from self-employment are deemed to equal net earnings from self-employment which he reported for the year. Thus, D's earnings for 1967 are estimated as follows:

Wages	$6,000
Net earnings from self-employment	2,300
Total	8,300

(4) *Reentitlement to disability insurance benefits.* If an individual's entitlement to disability insurance benefits terminates and such individual again becomes entitled to disability insurance benefits, the amount of the reduction is again computed based on the figures specified in this paragraph (c) applicable to the subsequent entitlement.

(d) *Items not counted for reduction.* Amounts included in the workmen's compensation award which are specifically identifiable as being for medical, legal or related expenses paid or incurred by the individual in connection with his workmen's compensation claim, or the injury or occupational disease on which it is based, are excluded in computing the reduction under paragraph (a) of this section.

(e) *Certification by individual concerning eligibility for workmen's compensation payment.* Where it appears that an individual may be eligible for a periodic benefit under a workmen's compensation law or plan which would give rise to reduction under paragraph (a) of this section, the individual may be required, as a condition of certification for payment of any benefit under section 223 of the Act to any individual for any month, and of any benefit

under section 202 of the Act for such month based on such individual's earnings record, to furnish evidence as requested by the Administration and to certify as to:

(1) Whether he has filed or intends to file any claim for such periodic benefit, and

(2) If he has so filed, whether there has been a decision on such claim. In the absence of evidence to the contrary, reliance may be placed upon a certification that he has not filed and does not intend to file such a claim, or that he has filed and no decision has been made, in certifying any benefit for payment pursuant to section 205(i) of the Act.

(f) *Workmen's compensation benefit payable on other than a monthly basis.* Where workmen's compensation benefits are paid periodically but not monthly, or in a lump sum as a commutation of or a substitute for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Administration determines will approximate as nearly as practicable the reduction required under paragraph (a) of this section.

(g) *Priorities.* (1) For an explanation of when a reduction is made under this section where other reductions, deductions, etc., are involved, see § 404.402.

(2) Whenever a reduction in the total of benefits for any month based on an individual's earnings record is made under paragraph (a) of this section, each benefit, except the disability insurance benefit, is first proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit is then applied to such disability insurance benefit.

Example: Under title II of the Act, A is entitled to a monthly disability insurance benefit of $122. His wife, B, and his two children, C and D, are entitled to monthly insurance benefits

of $61 each. After adjustment for the family maximum under section 203(a) of the Act, the benefits are $122 for A and $50.60 for B, C, and D making a total of title II benefits of $273.80. In computing A's "average current earnings," it is determined that A's average monthly wage used in computing his benefit rate is $340, and his average monthly wage for his 5 years of highest earnings after 1950 is $400. Therefore, 80 percent of his "average current earnings" for purposes of the workmen's compensation deduction is $320.

A becomes entitled to workmen's compensation of $48 a week, which converted to a monthly rate amount to $208 a month (i.e., 4⅓ times $48). The total monthly benefits payable under title II of the Act ($273.80) plus the monthly workmen's compensation amount ($208) equals $481.80. The amount of the reduction for workmen's compensation is $161.80 ($481.80 minus $320); and the family benefit payable is $112 ($273.80 minus $161.80 equals $112). (The same result is obtained by subtracting the workmen's compensation amount ($208) from the applicable limit ($320).)

In this example, the $161.80 reduction would be applied first against the three section 202 benefits ($50.60 times 3 equals $151.80) leaving $10 to be deducted from the disability insurance benefit.

(h) *Effect of changes in family composition.* The addition or subtraction in the number of beneficiaries in a family may cause the family benefit to become, or cease to be, the applicable limit for reduction purposes under this section. When the family composition changes, the amount of the reduction is recomputed as though the new number of beneficiaries were entitled for the first month the reduction was imposed, i.e., the same average monthly wage, average current earnings, and workmen's compensation amount and the total benefits pay-

able under title II of the Act for the new number of beneficiaries which would have been subjected to reduction for that first month are used. If the applicable limit both before and after the change is 80 percent of the average earnings, the amount payable remains the same and is simply redistributed among the beneficiaries entitled on the same earnings record.

Example: F is entitled to disability insurance benefits of $110.80 based on an average monthly wage of $289. His wife, G, and his child, H, are entitled to benefits under section 202 of the Act of $55.20 each. F becomes entitled to workmen's compensation of $192 a month. His average monthly wage for his 5 years of highest earnings after 1950 is $260.

The applicable limit on total benefits payable under title II of the Act and workmen's compensation is $231.20 (i.e., 80 percent of F's average current earnings). The amount payable is figured as follows:

Total title II benefits	$220.70	$220.70
Monthly workmen's compensation	192.00	
	412.70	
Less 80 percent of F's average current earnings	231.20	
Reduction amount	181.50	181.50
Amount payable		39.20

(Deducting the workmen's compensation amount ($192) from 80 percent of the average current earnings ($231.20) gives the same amount payable ($39.20).)

Later, another child, J, becomes entitled on F's earnings record and the benefits after adjustment for the family maximum but before reduction for the workmen's compensation become $110.30 to F, and $40.90 to G, H, and J each. Since the total family benefit is now higher than 80 percent of F's average current earnings, the total family benefit becomes the

applicable limit and the amount payable is figured merely by deducting the workmen's compensation ($192) from the total title II benefits ($233) leaving $41 payable to F.

(i) *Effect on benefit increases.* Any increase in benefits due to a recomputation or a statutory increase in benefit rates is not subject to the reduction for workmen's compensation and does not change the amount to be deducted from the family benefits. The increase is simply added to what amount if any is payable. If a new beneficiary becomes entitled to monthly benefits on the same earnings record after the increase, the amount of the reduction is redistributed among the new number of beneficiaries entitled under section 202 of the Act and deducted from their current benefit rate.

Example: K is entitled to disability insurance benefits of $118.80 and his wife, L, and his two children, M and N, are entitled to benefits under section 202 of the Act of $47.90 each (after reduction under section 203(a) to conform to the family maximum of $262.40). K becomes entitled to workmen's compensation of $30 per week ($130 per month). The total family benefit is higher by 10 cents than 80 percent of K's average current earnings (80 percent of $328, or $262.40). Therefore, the reduction amount equals the monthly workmen's compensation. One-third of this amount (rounded downward to the nearest 10 cents), i.e., $43.30, is deducted from L, M, and N's benefits leaving benefits payable as follows: $118.80 to K, and $4.60 each to L, M, and N.

Beginning in September 1966, a statutory increase raises K's disability insurance benefit to $122 and causes L, M, and N's benefits to be increased to $50.60 each (an increase of $2.70). The benefits then payable become: $122 to K, and $7.30 (i.e., $4.60 plus $2.70) each to L, M, and N.

In February 1967, O, another child of K, becomes entitled to benefits under section 202 of the Act based on K's earnings record. The benefits payable now become $122 to K, and $37.90 each to L, M, N, and O. The amount to be deducted from the family remains the same, $130, but is to be divided among four beneficiaries instead of three. Deducting one-fourth of $130 ($32.50) from $37.90 leaves $5.40 each to L, M, N, and O, and $122 to K.

(j) *Redetermination of benefits*—(1) *General.* In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 223 of the Act and any benefits under section 202 of the Act based on his wages and self-employment income is first required (in a continuous period of months), and in each third year thereafter, the amount of such benefits which are still subject to reduction under this section are redetermined, provided such redetermination does not result in any decrease in the total amount of benefits payable under title II of the Act on the basis of such individual's wages and self-employment income. Such redetermined benefit is effective with the January following the year in which the redetermination is made.

(2) *Average current earnings.* In making the redetermination required by subparagraph (1) of this paragraph, the individual's "average current earnings" (as defined in paragraph (c)(3) of this section) is deemed to be the product of his average current earnings as initially determined under paragraph (c)(3) of this section and the ratio of:

(i) The average of the taxable wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to

(ii) The average of the taxable wages of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which is not a multiple of $1 is reduced to the next lower multiple of $1.

(3) *Effect of redetermination.* Where the applicable limit on total benefits previously used was 80 percent of the average current earnings, a redetermination under this paragraph may cause an increase in the amount of benefits payable. Also, where the limit previously used was the total family benefit, the redetermination may cause the average current earnings to exceed the total family benefit and thus become the new applicable limit. If for some other reason (such as a statutory increase or recomputation) the benefit has already been increased to a level which equals or exceeds the benefit resulting from a redetermination under this paragraph, no additional increase is made. A redetermination is designed to bring benefits into line with current wage levels when no other change in payments has done so.

Example: Beginning January 1968, P is entitled to a disability insurance benefit of $140 and his wife, R, and child, S, are entitled to benefits under section 202 of the Act of $70 each. P becomes entitled to workmen's compensation of $208 per month. In this case, the applicable limit on the combined benefits is $360 (80 percent of P's average current earnings). Deducting the workmen's compensation amount of $208 from this limit leaves family benefits payable of $152 ($140 to P and $6 to R and S each). In 1970 a redetermination raises 80 percent of P's average current earnings to $380 effective January 1971. Thus, the family benefit payable becomes $172 ($380 minus $208). P's

benefit is $140, and R's and S's benefits are $16 each.

If there had been a benefit increase in 1969 (either by a statutory increase or a recomputation) increasing P's benefit by $10 (to $150) and each other benefit by $5 (to $11) the family would already be receiving $172 ($150 plus $11 plus $11 equals $172) at the time of redetermination, so that they would not get an additional increase. If the 1969 benefit increase made less than $172 payable to the family, the redetermination would increase the benefit to $172. Any statutory increase that takes effect after the redetermination would be added to the total family benefit.

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